

DECISION
TALBOT COUNTY BOARD OF APPEALS
Appeal No. 10-1533

Pursuant to due notice, a public hearing was held by the Talbot County Board of Appeals at the Bradley Meeting Room, Court House, South Wing, 11 North Washington Street, Easton, Maryland, beginning at 7:30 p.m., September 13, 2010, on the application of **BACK CREEK II, LLC** ("Applicant"). (After a short hearing the matter was continued to September 27, 2010, beginning at 7:30 p.m. when one of the members of the Board of Appeals elected to recuse himself from hearing the application.) The Applicant is seeking a modification of a special exception to increase the number of seats from 100 to 240, including both indoor and outdoor seating, in a special exception restaurant. Also, the Applicant is seeking a variance of the 100-foot shoreline development buffer to install two fixed metal-framed awnings over existing lot coverage to be 3.6 feet from mean high water at the closest point. The current structure is 19.6 feet from mean high water. The property is located on 6178 Tilghman Island Road, Tilghman, Maryland 21671. It is in the Village Center/Critical Area (VC/CA) zone. The property owner is Back Creek II, LLC, the Applicant. The request is made in pursuant to Chapter 190 Zoning, Article VI, §190-139, §190-140; Article IX, §190-180 E; and §190-182 of the Talbot County Code ("Code").

Present at the hearing were Board of Appeals members Paul Shortall, Jr., Chairman, Phillip Jones, Vice Chairman, Betty Crothers, John Sewell, and Margaret Young. The Applicant was represented by Willard C. Parker, II, Esquire, P.O. Box 1209, Easton, Maryland 21601. Michael L. Pullen, Esquire, County Attorney, represented Talbot County. Glenn D. Klakring was the attorney for the Board of Appeals.

It was noted for the record that all members of the Board had visited the site.

The following exhibits were offered and admitted into evidence as Board's Exhibits as indicated:

1. Application for variance with Attachment A.
2. Application for special exception modification with attachment.
3. Copy of a portion of the Talbot County tax map with the property highlighted.
4. Notice of Public Hearing.
5. Certificate of publication of the Notice of Public Hearing from the Star-Democrat.
6. Notice of hearing with a list of nearby property owners attached.
7. Copy of variance requirements from the Code with the Applicant's written response to each applicable requirement.
8. Copy of special exception requirements from the Code with the Applicant's written response to each applicable requirement.
9. Revised Staff Memorandum, dated August 26, 2010.
10. Revised Staff Memorandum, dated July 20, 2010.
11. Staff Memorandum, dated March 1, 2010.
12. Planning Commission comments.
13. Sign maintenance agreement.
14. Site Plans (two) prepared by Lane Engineering, LLC.
15. Seating floor plan.
16. Letter from the Critical Area Commission, dated July 20, 2010.
17. Disclosure & Acknowledgment Form.
18. Memorandum, dated September 10, 2010.
19. Memorandum, dated September 14, 2010.

The Board of Appeals decided to first consider the application for a modification of the special exception to increase the allowable seating at the restaurant to a maximum of 240 seats.

In his opening statement Mr. Parker advised the Board of Appeals that the Applicant had dismissed its appeal of an earlier decision of the Board. (In Appeal No. 1493-R the Board of Appeals revoked a special exception modification the Board had previously granted to Bay Hundred Restaurant, a former leaseholder of the property, allowing 270 seats at the restaurant. Back Creek II, LLC appeared at that hearing and advised that the leaseholder, Bay Hundred Restaurant, had been evicted. Back Creek II, LLC asked that the Board of Appeals not revoke the expanded seating special exception. The Board of Appeals denied that request. The effect of that denial was to limit the restaurant to 100 seats. Back Creek II, LLC appealed that decision to the Talbot County Circuit Court.) Mr. Parker provided the Board with a copy of the Stipulation of Dismissal of the Appeal. It was admitted as Applicant's Exhibit No. 1. He said that the Applicant now has a new operator of the restaurant and is seeking permission to expand the restaurant to 240 seats.

Mr. Parker said that because of its location on Knapps Narrows the restaurant serves a summer tourist trade as well as local patrons. It is not a "high end" restaurant, so its margins are smaller and its profitability is more dependent on volume. He said that the increased seating would have a positive effect on local employment and suppliers. Finally, he said that persons attending the earlier revocation hearing were concerned with loud music from the restaurant, not the number of restaurant seats.

The first witness was Jorge Alvarez, 303 Market Street, Oxford, Maryland 21654. Mr. Alvarez testified that he became the general manager of the Bay Hundred Restaurant on April 1, 2010. He has been in the restaurant business for 35 years, most recently as the executive chef of 202 Dover, a restaurant in Easton, Maryland.

Mr. Alvarez said that the restaurant hours of operation are 11:30 a.m. to 9:00 p.m. Sunday through Thursday and to 10:00 p.m. on Friday and Saturday. He clarified that the closing time is when the kitchen closes. The restaurant and bar remain open to allow patrons to complete their meals. The

restaurant serves two meals per day. It currently has 21 employees. With seating for 240 it will require 10 more employees.

In 2009, when the restaurant was permitted 275 seats, the revenue was over \$500,000.00. In 2010, when seating was reduced to 100, revenues decreased by about \$140,000.00. The restaurant is more of a family style restaurant with an average bill of about \$28 per person. "High end" restaurants have an average bill of \$60 to \$70 per person. High end restaurants can make a profit with a smaller number of diners but at \$28 per meal a 100-seat restaurant is not viable.

The restaurant serves both transient and local patrons. The patrons tend to be more local in the fall and winter. The majority of the restaurant's revenue is earned in the late spring and summer when most of the customers are transients.

Mr. Alvarez testified that he has spoken to neighbors of the restaurant and no one is against the proposed expansion of its seating.

He said that after the restaurant was required to reduce its seating it has had to decrease purchases of supplies from local suppliers.

The next witness was Mark F. Julyan, 27191 Baileys Neck Road, Easton, Maryland 21601. He has been the manager of the Back Creek II, LLC property in Tilghman for 15 years. Through Mr. Julyan and Mr. Alvarez the Applicant addressed the specific special exception requirements. Mr. Alvarez reported that there would be no increase in exterior lighting and the restaurant was in compliance with all Health Department regulations. He also testified that the restaurant's liquor license has a specific condition that the restaurant may not play live or recorded music outside.

Mr. Julyan said that the property has well water and public sewer. It has adequate parking with 48 spaces. He offered a plat showing the location of the parking spaces. The plat was admitted as Applicant's Exhibit No. 2. He said that parking was never a problem when the former restaurant was

operating with 275 allowable seats. He said that the restaurant has direct access to Route 33 and it does not rely on the use of any residential roads. He offered two aerial photographs of the property, one recent and one from a 1967 *National Geographic* magazine. They were admitted as Applicant's Exhibits No. 3 and No. 4, respectively.

The Board then considered the application for a special exception modification to allow a maximum of 240 seats at the restaurant. The Board discussed the matter and upon motion duly made and seconded, the Board made the following findings of fact and law in regarding the requested special exception modification:

1. All legal requirements pertaining to a public meeting were met.
2. The proposed use is consistent with the purposes and intent of the Talbot County Comprehensive Plan and complies with the standards of the land use district in which it is located. The current use of the property may intensify but will not change.
3. The proposed use is compatible in terms of scale, bulk and general appearance with adjacent land uses and with existing and potential uses in its general area. The present structure will not change significantly nor will the present use of the structure change as a result of the special exception. With the condition of no outside music, previously found to be a nuisance to neighboring residential properties, the proposed modification of the special exception will not be detrimental to the economic value of neighboring property.
4. The proposed use will not constitute a nuisance to other properties and it will not have significant adverse impacts on the surrounding area due to trash, odors, noise, glare, vibration, air and water pollution and other health and safety factors or environmental disturbances. The structure is an existing structure and its use will not be changed. It has adequate existing provisions for the aforementioned factors. As in the previous finding

the condition of no outside music, previously found to be a nuisance to neighboring residential properties, will not be a factor if the Applicant complies.

5. The proposed use will not have significant adverse impact on public facilities or services including roads, schools, water and sewer facilities, police and fire protection or other public facilities or services. The current structure along with its existing utilities, lot size and parking, and public access are all adequate for the proposed increased seating for the restaurant. The increased seating will not have a significant impact on public facilities or services.
6. The proposed use will not have a significant adverse effect upon marine, pedestrian, or vehicular traffic. The increased seating in the restaurant might conceivably increase marine and vehicular traffic to and from the restaurant. However, the property has adequate provisions for dockage and parking and access thereto for any such increase of marine or vehicular traffic such that it will not result in a significant impact. It will not impact pedestrian traffic.
7. The proposed use will not produce traffic volumes which would exceed the capacity of public or private roads in the area or elsewhere in the County, based on the road classifications established in Chapter 134, the Talbot County Roads and Bridge Ordinance, and other Applicable standards for road capacity. The restaurant property has immediate and adequate access to the adjacent state road for any increased traffic resulting from the increased seating capacity. The state road will easily absorb any such increased traffic.
8. Vehicle access to off-street parking areas and drive-in facilities are designed to minimize conflicts between vehicular, bicycle and pedestrian traffic and to minimize impacts on

adjacent properties and on public or private roads. In addition, any resulting commercial and truck traffic will not use a residential street or create a hazard to a developed residential area. As noted above, the restaurant property is adjacent to and has adequate access to a state road.

9. The proposed use will not significantly adversely affect wildlife with respect to the site's vegetation or water resources in supplying food, water, cover, habitat, nesting, or other needs of wildlife. The increased seating will not change the physical structure of the restaurant or property. It will not impact wildlife.
10. The proposed use will not adversely affect any adjacent existing agricultural uses. There are no existing adjacent agricultural uses.

The vote was five to zero to approve the requested modification of special exception consistent with the evidence presented to the Board of Appeals and subject to the condition that the Applicant shall not produce, cause or sponsor any outdoor music on any part of the property, live or recorded, whether amplified or not. The Board previously found such outdoor music to be a nuisance to and adversely impact nearby residential property. The Board recognizes that, on occasion, persons on a boat or in a vehicle visiting the property may produce such music (or other disturbances). To the extent practicable the Board of Appeals expects that the Applicant will make appropriate efforts to control such disturbances created by patrons, as it may adversely affect other patrons of the restaurant as well as nearby property owners.

The Board of Appeals then heard evidence regarding the proposed variance of the 100-foot shoreline development buffer to install two fixed, metal awnings over existing lot coverage to be 3.6 feet from mean high water at the closest point.

Mr. Parker summarized the variance request. The Applicant wishes to construct fixed, metal frame awnings over an exterior part of the restaurant structure between the restaurant and the bulkhead and piers extending into Knapps Narrows. They are designed to shelter patrons from passing rainstorms and direct summer sunlight. He noted that the Critical Area Commission does not oppose the variance request.

The Applicant's first witness regarding the variance request was Richard L. VanEmburch, Civil Engineer, Lane Engineering, 117 Bay Street, Easton, Maryland 21601. He testified that the entire site, with minor exceptions, is impervious. It is exempt from the Storm Water Management ordinance. The proposed awnings would not cover any surface that is not already impervious. He submitted a Bay Hundred Restaurant Stormwater Management Report dated December 30, 2009. It was admitted as Applicant's Exhibit No. 5. He said that runoff is addressed by use of above ground planter boxes.

Mr. Parker offered a photograph of the restaurant showing previously existing awnings on the Knapps Narrows side of the restaurant. The photograph was admitted as Applicant's Exhibit No. 6.

Mr. Parker then offered a series of four photographs of the property of differing dates from the 1930's to the late 1980's. They demonstrated that the property proposed to be covered by the awnings has been impervious continuously from the 1930's to the present. The photographs were admitted as Applicant's Exhibit No. 7, No. 8, No. 9, and No. 10.

The next witness was Amy Swartz, 21498 Gibsontown Road, Tilghman, Maryland 21671. She grew up in the Tilghman area and has been familiar with the property since the mid to late 1980's. She said that there has always been outside seating at the restaurant up to the bulkhead between the restaurant and Knapps Narrows.

Mr. Julyan said that pavers replaced gravel in that area in the 1980's.

Mr. Alvarez said that the awnings are designed to shade and protect patrons from the weather. He chose to site the awnings on the water side of the restaurant because that is traditionally where outdoor seating has been for the restaurant. He said that side has the best access to the kitchen and bar. Other sides of the structure are not useful as they have utility structures and/or parking areas.

Mr. Parker then addressed each variance requirements.

The final witness was Basil M. DeLashmutt, 5689 Poplar Lane, Royal Oak, Maryland 21662. He testified that he is the principal owner of Back Creek II, LLC and has owned the subject property since 1987. He was in favor of the requested special exception and variance.

The Board then considered the variance request for the awnings. Upon motion duly made and seconded, that the variance request be approved subject to certain conditions the Board of Appeals made the following findings with regard to the proposed variance:

1. There are special conditions or circumstances that are peculiar to the land or structure such that a literal enforcement of the Code would result in an unwarranted hardship to the property owner. The area over which the awnings will be erected are long standing impervious surfaces having been paved or graveled for at least fifty years, long before the Applicant purchased the property. The awnings do not add any new impervious surface coverage to the site, but merely enhance the comfort and safety of customers and staff.
2. A literal interpretation of the Critical Area requirements of this chapter will deprive the property owner of rights commonly enjoyed by other property owners in the same zoning district. Other owners in the same zoning district are able to use pre-existing lot coverage and impervious surfaces for uses and structures contemplated by the Zoning Ordinance.
3. The granting of a variance will not confer upon the property owner any special privilege that would be denied by this chapter to other owners of lands or structures within the same zoning

district. The Applicant will continue to use an area that has been used for the same or similar purposes for many years.

4. The variance request is not based on conditions or circumstances which are the result of actions by the applicant, including the commencement of development activity before an application for a variance has been filed, nor does the request arise from any condition relating to land or building use, either permitted or nonconforming, on any neighboring property. The request is related to historical use of the property predating the Critical Area laws and regulations.
5. The granting of the variance will not adversely affect water quality or adversely impact fish, wildlife or plant habitat, and the granting of the variance is in harmony with the general spirit and intent of the state Critical Area Law and Critical Area Program. The variance will be subject to certain conditions insuring the same.
6. The variance does not exceed the minimum adjustment necessary to relieve the unwarranted hardship.
7. The need for the variance is not because the lot is a legal nonconforming lot.

The vote was five to zero to approve the requested variance. The variance is subject to the following conditions:

1. The Applicant shall apply for a Pre-Application meeting prior to making a submission for a Major Site Plan review for the steel framed awnings in accord with Talbot County Code, section 190-184.
2. Upon Major Site Plan approval, the Applicant shall obtain proper permits from the Department of Permits and Inspections for all variances granted by the Board of Appeals.


3. Mitigation for the approved disturbance in 100-foot shoreline development buffer shall be a three to one ratio.

HAVING MADE THE FOREGOING FINDINGS OF FACT AND LAW, IT IS, BY THE TALBOT COUNTY BOARD OF APPEALS,

RESOLVED, that the Applicant, **BACK CREEK II, LLC** (Appeal No. 10-1533) is **GRANTED** the requested special exception consistent with the evidence presented to the Board of Appeals and is **GRANTED** the requested variance consistent with the evidence presented to the Board of Appeals, each subject to the aforementioned conditions, each by vote as previously noted.

GIVEN OVER OUR HANDS, this 22nd day of November, 2010.

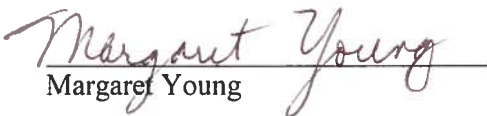
TALBOT COUNTY BOARD OF APPEALS


Paul Shortall, Jr., Chairman


Phillip Jones, Vice Chairman


Betty Crothers


John Sewell


Margaret Young

Board of Appeals/1533.BackCreekIIVarianceSpecialExceptionCA